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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 208

GRAND TRUNK WESTERN RAILROAD COMPANY,
a Michigan corporation,
Petitioner,

vs.

ADEL PRECISION PRODUCTS CORPORATION,
a corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

BRIEF OPPOSING PETITION FOR CERTIORARI

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AMERICAN BRIEF AND RECORD COMPANY, GRAND RAPIDS 2, MICHIGAN

SUBJECT INDEX

	Page
Brief Opposing Petition for Certiorari	1
I. Opinion Below	1
II. Jurisdiction	1
III. Concise Counter-Statement of the Case	2
1. Defining the Issue	2
2. Counter-Statement of Facts	2
IV. Questions Presented	5
V. Summary of the Argument	6
A. Respondent's Position	6
1. Petitioner's duties are defined by the terms of the order bill of lading and section 9(c) (49 U.S.C.A. §89) or section 9(a) (49 U.S.C.A. §89) of the Federal Bills of Lading Act	6
(a) The party to whom petitioner delivered the goods was not a person within the provision of section 9(c) of the Federal Bills of Lading Act. The case of *Pere Marquette Ry. Co. v. J. F. French & Co.*, 254 U. S. 538, 65 L. Ed. 391, 41 Sup. Ct. 195, does not affect the rights of the carrier as contended by petitioner	7
(b) The person to whom petitioner delivered the goods was not a person within the provisions of section 9(a) of the Federal Bills of Lading Act as affected by Sections 29 (49 U.S.C.A., §109), 32 (49 U.S.C.A. §112), 33 (49 U.S.C.A. §113), and 34 (49 U.S.C.A. §114) of the Act	7

Page

2. Ratification is a question of fact. Dicta in the case of *Midland Linseed Co. v. American Liquid Fireproofing Co.*, 183 Iowa 1046, 166 N. W. 573, does not change the general rule that mere demand for payment does not, as a matter of law, constitute ratification. The Michigan State Supreme Court does not conflict with the decision in the *Midland Linseed Co.* case 8

B. Analysis of Petitioner's Position 10

1. Petitioner contends a carrier may deliver to a person in possession of an order bill of lading regardless of the validity of the endorsement thereon. This contention conflicts with the common law liability of the carrier as expressed in *Keystone Grape Co. v. Hustis*, 232 Mass. 162, 122 N. E. 269, the decision of this court in *Pere Marquette Ry. Co. v. J. F. French & Co.*, 254 U. S. 538, 65 L. Ed. 391, 41 Sup. Ct. 195, and the Colorado Supreme Court in *Davis v. Fruita Mercantile Co.*, 74 Col. 247, 220, P. 983 (1923) 10

Application of Secs. 29, 32, 33 and 34 of the Federal Bills of Lading Act (Title 49, U.S.C.A. §109, 112, 113 and 114) depends upon a question of fact. Such sections do not apply to this case as contended by petitioner and were so determined by the jury and the lower courts 11

Mere demand for payment does not, as a matter of law, constitute ratification 11

VI. Conclusion 11

Appendix A — Chronological Reply ~~of~~ To Petitioner's Brief 12

Appendix B — Statutes Cited 21

TABLE OF CASES, TEXTBOOKS, AND STATUTES CITED

Page

Cases and Textbooks Cited:

15 A.L.R. 2d 813 ..... 9, 20
Atlantic Coast Line Ry v. Dahlberg Brokerage Co., 154 So. 169, 170 Ala. 617 16
10 C.J.S. 693 3
13 C.J.S., Section 174c(3) 9, 19
Davis v. Fruita Mercantile Co., 74 Col. 247, 220 P. 983 (1923) 10, 13
Keystone Grape Co. v. Hustis, 232 Mass. 162, 122 N. E. 269 ..... 10, 12, 13
Midland Linseed Co. v. American Liquid Fireproofing Co., 183 Iowa 1046, 166 N.W. 573 ..9, 11, 20, 21
Pere Marquette R. Co. v. J. F. French & Co., 254 U.S. 538, 65 L. Ed. 391, 41 Sup. Ct. 195 .... 7, 10, 13, 14, 18
Restatement of the Law, Agency 17
Smith v. Landa, 45 Tex. Civ. App. 446, 101 S. W. 470 16

Statutes Cited:

Bills of Lading Act

Section 8 (Title 49 U.S.C.A., §88) 21
Section 9 (Title 49 U.S.C.A., §89) 6, 13, 14, 15, 18
Section 9(a) 6, 7, 18
Section 9(b) 18
Section 9(c) 6, 7, 13, 15, 18

Section 10 (Title 49 U.S.C.A., §90) 18
Section 29 (Title 49 U.S.C.A., §109) 8, 18, 19
Section 32 (Title 49 U.S.C.A., §112) 8
Section 33 (Title 49 U.S.C.A., §113) 8
Section 34 (Title 49 U.S.C.A., §114) 8

Sections of the Federal Bills of Lading Act set out in Appendix B:

	Page
Section 8 (Title 49 U.S.C.A., §88)	21
Section 9 (Title 49 U.S.C.A., §89)	21
Section 10 (Title 49 U.S.C.A., §90)	22
Section 29 (Title 49 U.S.C.A., §109)	22
Section 32 (Title 49 U.S.C.A., §112)	22
Section 33 (Title 49 U.S.C.A., §113)	23
Section 34 (Title 49 U.S.C.A., §114)	23

Interstate Commerce Act

Part I, Section 20(11), (Title 49 U.S.C.A., Section 20(11)), (Relevant provisions thereof)	23

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I.

Opinion of the Court Below.

The opinion of the Supreme Court of Michigan is reported as *Adel Precision Products Corporation v. Grand Trunk Western Railroad Company,* 332 Mich. 519; it appears unofficially in 51 N. W. 2d 922.

II.

Jurisdiction.

We accept petitioner's statement of jurisdiction, to the effect that there are questions of Federal law involved, but deny that there is a conflict between this decision of the State Supreme Court and the authorities cited by petitioner.

III.

Concise Counter-Statement of the Case.

1.

Defining the Issues here Involved.

The litigation below drew in question the interpretation of the Federal Uniform Bills of Lading Act[1] as to the requirement of proper endorsement upon an order bill of lading. Petitioner railroad company delivered a carload of farm machinery shipped interstate upon surrender of an order bill of lading bearing on the back thereof and in the usual place for endorsement, the typewritten name of the consignee. The order bill of lading had not been endorsed by the consignee nor had the purported typewritten endorsement been placed on the bill of lading with its knowledge or authority.

Petitioner claims that delivery was justified, but also claims that if it is found that the delivery was not justified, the respondent ratified the delivery.

2.

Counter-Statement of the Facts.

We respectfully note the following inaccuracies and insufficiencies in petitioner's Statement of the Case (Supreme Court Rule 27).

Petitioner asserts, page 16, that:

> "Newkirk Manufacturing Company, under instructions of respondent, was to mail the original bill of lading to respondent. Through error of one Noon, acting shipping clerk for Newkirk Manufacturing Company, the original was mailed on date of its issuance, July 27, 1948, to Hickman Farm Supplies, Inc.

[1]Act of August 29, 1916, Chap. 415, 39 Stat. L. 538. (Title 49 U.S.C.A. §81 et seq.)

> at Lansing and a copy with invoices was mailed to respondent at Burbank, California (R. 21-23, 27)."[2]

Counsel have omitted to add that the order bill of lading so erroneously mailed was *not endorsed* and that the original bill of lading did *not* contain the typewritten endorsement

> "Adel Prec. Prod. Corp."

at the time of such mailing (R. 22-23).[3] And the State Supreme Court found, page 522:

> "There is no testimony that the endorsement, 'Adel Prec. Prod. Corp.' in typewriting was on the original when received by Hickman."

On page 17, petitioner, in its Statement of the Case, describes the endorsement upon the bill of lading by means of a quotation from the opinion of the State Supreme Court, and then counsel conclude:

> "The bill of lading when surrendered to the petitioner was endorsed as above stated (R. 53-54). A typewritten endorsement is a legal endorsement, 10 C.J.S. 693."[4]

The following, with respect to the endorsement, is an additional pertinent quotation from the opinion of the State Supreme Court, p. 524:

> "There was no proper endorsement on the order bill of lading, according to undisputed testimony, be-

---

[2]The instrument was prepared in quadruplicate, the first copy and original being intended for respondent, the second copy for the railroad, the third copy for respondent, and the fourth copy to be retained by the Newkirk Manufacturing Company for its files. Through an error the original bill of lading was placed in an envelope and sent directly to Hickman Farm Supplies, Inc. at Lansing (R. 21, 22).

[3]This circumstance we consider to be the most significant feature of the entire case, and unless precisely stated and presented does not reveal the fundamental issue.

[4]The normal inference from this statement would lead to the belief that the question presented was whether a typewritten endorsement could be a legal endorsement. No question was ever raised upon this point. The requirement of "properly endorsed" as applied to the typewritten name failed, not because of the manner of execution, but because it lacked authority.

cause the typewritten endorsement is clearly shown to have been unauthorized."

Petitioner, on page 15, makes reference to the purchase order forwarded by Hickman Farm Supplies, Inc. and the use of the word "OPEN" under "TERMS," but refers only to the testimony of petitioner's witnesses as to its interpretation. Respondent's credit manager testified that in his opinion the term "OPEN" would "not necessarily" mean open account (R. 36), that he did not so interpret it, and that when he issued shipping instructions he specified "sight draft order bill of lading" (R. 30). The shipment was actually made upon an order bill of lading consigning the merchandise to respondent (R. 21).[5]

Petitioner, page 17, refers to a letter written by Hickman Farm Supplies, Inc., expressing appreciation for shipping the merchandise on open account, and then counsel state:

> "It was upon receipt of that letter that respondent first learned that the goods had been delivered (R. 33). Respondent then knew that Hickman Farm Supplies, Inc. understood that the sale had been made on open account (R. 68).
>
> "On August 19 respondent replied demanding payment for goods delivered (R. 34-35). This letter, while not in evidence, is mentioned in a later letter, dated September 28, 1948, (Exhibit 13) * * *."

Actually the letter of reply of August 19, 1948 above referred to, does appear in evidence as Exhibit 17 (R. 47, 48, 49, 50), does not demand payment and states in part as follows:

> "Gentlemen: We have your letter of August 12th with reference to shipping your equipment on open account, and on checking this with our accounting department we find that the factory made an error and forwarded you the order bill of lading instead of sending it on to the main office here to be sent to the bank

[5]Interpretation of the phraseology of the purchase order by others is, therefore, immaterial. The rights between petitioner and respondent are fixed by the contract between them, i.e. the order bill of lading.

with the sight draft. We have never shipped any distributors on an open account basis. We deemed it advisable to adopt this policy because of the long distance from our factory to where each distributor is located * * *." (Exhibit 17) (R. 47, 48).

Requests for payment referred to in petitioner's brief, page 17, were therefore subsequent to the explanation above set forth in Exhibit 17.

IV.

Questions Presented.

We cannot accept the first of the "Questions Presented" by counsel for petitioner, Petition for writ of Certiorari, page 4, because, although having the virtue of brevity is, we feel, incomplete. The first question is set forth as follows:

1. Was your petitioner justified in delivering the shipment of goods, here involved, upon surrender to it of the order bill of lading on which the same was transported, which bore the purported endorsements of the party to be notified, as well as of the respondent?

Our suggestion is that the question might be rephrased thus:

1. Was your petitioner justified in delivering the shipment of goods, here involved, upon surrender to it of the order bill of lading on which the same was transported, which bore on the back thereof and in the usual place for endorsement the typewritten name of the consignee, but which had not been endorsed by the consignee, nor had the purported typewritten endorsement been placed upon the bill of lading with the consignee's knowledge or authority?

ARGUMENT

A.

RESPONDENT'S POSITION

It is the contention of the respondent that the Supreme Court of the State of Michigan properly held, at page 525:

> "The Federal bill of lading act did not authorize defendant under the circumstances of this case, to deliver to Hickman the goods in question."

and that there had been no ratification of the wrongful delivery by the carrier, as a matter of law.

(1) Hickman Farm Supplies, Inc. was not a person to whom the petitioner was entitled to deliver the goods within the meaning of the Federal Uniform Bills of Lading Act.

In order for the petitioner to fulfill the duties imposed upon it when it accepted the goods in question for shipment under an order bill of lading, (duties imposed both by the terms of the order bill,[6] the Federal Uniform Bills of Lading Act,[7] and the Interstate Commerce Act[8]) it would be at least necessary for it to show that the goods had been delivered to a person who could qualify under either section 9(c) of the Bills of Lading Act (49 U.S.C.A. § 89) or section 9(a) thereof. This, we submit, the petitioner has not and cannot do.

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[6]This order bill of lading bore on its face the statement:

> "The surrender of this Original ORDER Bill of Lading properly endorsed shall be required before the delivery of the property."

Petitioner has substantially ignored this provision and suggests no method of avoiding these contractual obligations, a provision which is not prohibited by law or contrary to express legislative intent.

[7]Federal Uniform Bills of Lading Act, being Act of August 29, 1916, Chap. 415, 39 Stat. L. 538 et seq. (Title 49 U.S.C.A. §81 et seq.) and more specifically sections 8 and 10 thereof (Title 49, U.S.C.A. § 88 and 90).

[8]Section 20(11), Part I of the Interstate Commerce Act (Title 49 U.S.C.A., Sec. 20(11)).

(a)

Section 9(c) of the Federal Bills of Lading Act provides that a carrier is justified in delivering goods to one who is —

> "A person in possession of an order bill for the goods, by the terms of which the goods are deliverable to his order; or which has been indorsed to him, or in blank by the consignee, or by the mediate or immediate indorsee of the consignee."

Petitioner cannot claim any relief from this section for it is clearly shown in the record and in the opinion of the State Court (p. 524) that there was no person involved in this case who had in his possession a bill by the terms of which the goods were deliverable to his order, or which had been endorsed to him by the consignee or an endorsee of the consignee.

It would appear from an examination of the petitioner's brief in this court and its contentions in the lower courts, that the only case upon which the petitioner is relying to avoid this requirement, is the case of

Pere Marquette Railway Co. v. J. F. French & Co.,
254 U. S. 538, 65 L. Ed. 391, 41 Sup. Ct. 195

and language extracted from that case. It positively appears, however, from the decision of that case, that the test of section 9(c) had been fulfilled and that the person to whom the goods were delivered had in his possession an order bill of lading "endorsed to him by the consignee".

(b)

Section 9(a) of the Federal Bills of Lading Act provides that a carrier is justified in delivering goods to one who is —

> "A person lawfully entitled to the possession of the goods,"

and is the only section, other than section 9(c), to which the petitioner can turn to find relief from its duties in this case and situation.

It being shown that at the time this transaction first commenced the title to the goods in question was in respondent (R. 31), it is incumbent upon the petitioner to show some interest in the goods in Hickman Farm Supplies, Inc. (hereinafter referred to as Hickman), the person to whom it delivered the goods, which showing could only be made by the proof of some type of conveyance or agreement between respondent and Hickman. No such showing was made, nor seriously contended for, except in connection with the use of sections 29, 32, 33 and 34 of the Bills of Lading Act, which in substance, provide that a right to the possession of the goods held by a carrier under a bill of lading may be transferred by the manual transfer of the bill itself —

> "accompanied with an agreement, express or implied, to transfer the title to the bill or to the goods represented thereby."

This contention and attempted showing must fail, however, for there is no proof in the entire case of any intention on the part of the respondent to transfer title to the bill, or the goods represented thereby to Hickman. The only evidence which even faintly bears on this claimed intention on the part of the respondent is the fact that an order bill of lading was erroneously forwarded, unendorsed, to Hickman, through the inadvertence of an employee, and the fact that the respondent requested that Hickman pay for the goods after it was discovered that the goods had been delivered to Hickman.[9]

(2) The State Supreme Court was correct in holding, that it was proper for the Trial Court to submit to the Jury the question of ratification.

Ratification is essentially a fact question as to the intent of the party involved, and except in the unusual situation in which the facts are undisputed or of such a nature that

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[9]In this connection the petitioner has urged that the use of the term "OPEN" by Hickman and the interpretation placed on that term by Hickman should be included as a factor in determining respondents intent. This item has not been set forth above because there was no showing made that the respondent was aware of Hickman's understanding of the meaning of the term "OPEN" until after it had notice of the fact that Hickman had wrongfully received the goods. Further, the contention was also discarded by the opinion of the jury, the lower court and the State Supreme Court.

only one reasonable conclusion can be reached thereon, the question is one for the jury. 13 C.J.S., *Carriers* § 174c(3), p. 353. Being as it is a subsequent acting principle, ratification can only be applied from the facts which have occurred after the person who is to do the ratifying has had full knowledge of the facts. Petitioner's counsel in this case have argued that the court must take into account facts which occurred prior to the obtaining of full knowledge by the respondent, a proposition clearly at odds with the very idea of ratification, but even if such a principle could be established, it would be of no avail in the present instance for there were no probative facts presented in this case occurring prior to respondent obtaining full knowledge, which would show an intent on the part of the respondent to sell goods to Hickman on credit.

The only undisputed facts which could have a possible bearing on the question of ratification are the fact that the respondent did request payment for the value of the goods from Hickman, and the fact that this demand for payment was made after an explanation of the respondent's position in regard to its refusal to make sales on open account in the letter of August 19, 1948, Exhibit 17 (R. 47, 48).

There may be some difference of opinion between the courts of the states as to exactly where the dividing line may fall and beyond which, there will be ratification as a matter of law. A mere demand for payment, however, is not a ratification, as a matter of law. 15 A.L.R. 2d 813, § 7.

Finally, it can be seen from the opinion of the State Supreme Court that there is no conflict between its holding in the instant case and the holding in the decision of the Iowa court in the *Midland* case cited by petitioner, being

> *Midland Linseed Co. v. American Liquid Fire-Proofing Co.*, 183 Iowa 1046; 166 N. W. 573

for the court points out at page 527:

> "The facts in the *Midland Linseed Co.* case (the Iowa case) are materially dissimilar to the facts in the instant case * * *."

B.

BRIEF ANALYSIS OF PETITIONER'S POSITION[10]

It is the respondent's contention and position that there are no real questions of substance raised by this petition for certiorari, which are not now well settled. Basically, we believe that petitioner's position may be abstracted into three propositions, each of which propositions is contrary to well established law, and the approval of which would require the establishment of the following new principles:

(1) **A carrier may deliver goods to a person in possession of an order bill of lading regardless of the validity of the endorsements thereon.**

This is in direct conflict with the liability of carriers under common law as expressed in

> *Keystone Grape Co. v. Hustis*, 232 Mass. 162; 122 N. E. 269

and carried over into Sec. 10 of the Federal Bills of Lading Act (Sec. 49 U.S.C.A., Par. 90). Petitioner relies upon language taken out of context from the case of

> *Pere Marquette Ry. Co. v. J. F. French & Co., supra,*

as showing that the Federal Bills of Lading Act changed the *Keystone Grape Co.* case decision.

Contrary to petitioner's position is the case of *Davis v. Fruita Mercantile Co.*, 74 Col. 247; 220 P. 983 (1923).

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[10]Attached hereto as Appendix A, to aid the court in the comparison of the positions taken by the parties, is a more detailed statement and analysis of the positions and statements set forth in the petitioner's brief in the same chronological order used by the petitioner.

(2) A mistaken delivery of an unindorsed bill of lading to a person who believes he is buying on open account constitutes an agreement to transfer title to the goods.

Petitioner attempts to find a contract (agreement) in the term "open" employed by one of the parties to a supposed agreement by using only that party's interpretation of the term. Petitioner makes a binding agreement upon the expectations of one party and the mistake of another and ignores the requirement of a mutuality of intent to form a binding agreement.

(3) Mere demand for payment of the value of goods wrongfully delivered constitutes a waiver of the wrongful delivery by the carrier.

Petitioner predicates this position upon dicta from the case of

Midland Linseed Co. v. American Liquid Fireproofing Co., supra

which is contrary to other decided cases and sound legal reasoning.

CONCLUSION

It appears to respondent that there are no questions of sufficient importance, questionability or merit, to require the decision of this court, nor does there appear to be a conflict of opinion on the questions involved. Therefore, on the foregoing reasons and grounds, respondent respectfully requests that the petition for a Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX A

Chronological Reply to Petitioner's Brief

I.

THE STATE SUPREME COURT WAS CORRECT IN HOLDING, "THE FEDERAL BILL OF LADING ACT DID NOT AUTHORIZE DEFENDANT, UNDER THE CIRCUMSTANCES OF THIS CASE, TO DELIVER TO HICKMAN THE GOODS IN QUESTION."

A. THE *KEYSTONE GRAPE CO.* CASE[1]

We submit that counsel for petitioner is in error in contending, on page 22 of their brief, that the respondent claimed or the State Supreme Court considered, that the *Keystone Grape Co.* case was a construction of the Federal Bills of Lading Act.[2] It was and is the claim of respondent, and appears to be the holding of the State Supreme Court, that, although decided before the passage of the Act, the *Keystone Grape Co.* case is good precedent, states accurately the present law as to the necessity of "proper endorsement" upon an order bill of lading, and defines the contractual rights between the shipper and the carrier on an order bill of lading.[3]

Counsel for petitioner have, as they did in the courts below, if we understand their position correctly, predi-

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[1] *Keystone Grape Co. v. Hustis*, supra, and discussed on p. 20 of petitioners brief.

[2] Counsel also state, p. 21, that the State Supreme Court by quoting from the syllabus of the *Keystone Grape Co.* case,

> "in effect * * * holds that a delivery by a carrier contrary to the terms of the bill of lading, without anything more constitutes a conversion and renders a carrier liable for the value of the goods,"

and then suggest that such construction would negative the necessity of legal proof of damages and prevent the assertion of legal defenses, etc. We merely comment that syllabus statements assume the exclusion of other legal impediments not enumerated.

[3] Although petitioner recites in its brief that the bill of lading (Exhibit 7) bore the statement,

> "The surrender of this Original ORDER Bill of Lading properly endorsed shall be required before the delivery of the property,"

counsel make no reference or comment upon its significance throughout their entire brief. Counsel for petitioner completely ignore this provision in their Argument and the contention that they urge contradicts this language.

cated their contention upon the belief that the decision in the *Keystone Grape Co.* case is contrary to extracted language of the court's opinion in the *Pere Marquette Ry. Co.* case and counsel's construction thereon.

It appears to us that this misconception arises because counsel has completely ignored the requirement of Section 9 of the Federal Bills of Lading Act (Title 49, U.S.C.A. Sec. 89), which requires that the instrument be properly "endorsed by the consignee." And we likewise feel that petitioner has extracted only a portion of the opinion of the *Pere Marquette Ry. Co.* case in an attempt to reach a conclusion wholly different than the intent of the entire opinion.

It should be noted that in the *Pere Marquette Ry. Co.* case the bill of lading was properly endorsed (i.e. in blank), a fact, moreover, expressly stated in the opinion of the court by the following, on p. 397:

> "Concluding, therefore that there was a delivery, that it was made to a person in possession of the bill of lading, *properly endorsed,* that it was made in good faith the important question remains: * * *" (Emphasis Supplied)

In substance, the same position here taken by the petitioner was urged by the appellant in the case of

Davis v. Fruita Mercantile Co., supra,

The Colorado court acknowledged that the case was governed by the federal law, and that it was bound by the decisions of the U. S. Supreme Court, but rejected the argument with the following statement, p. 986:

> "The defendant says that, under the decision of the Supreme Court of the United States in *Pere Marquette Ry. Co. v. French & Co.* * * * this diversion at Fort Worth, Texas, by Rigdon, made at the request of the grain company, which held the unindorsed bill of lading, constituted a delivery which fully discharged and satisfied the obligations assumed by the carrier thereunder. * * * The decision in the *French* (*Pere Marquette Ry.*) case is thus concisely stated in the syllabus:

'Under the Uniform Bills of Lading Act, a carrier is justified in delivering the goods to the person in physical possession of the order bill of lading properly indorsed unless it has information that such person is not lawfully entitled to them.'

* * *

"The converse is necessarily true, that the carrier is not justified if the bill is not properly indorsed, * * *. The court several times repeats, as if by way of emphasis, that the order bill of lading in that case was indorsed in blank by the consignee, which, of course, brings the case clearly within the purview of subdivision 'c', section 9. There is nothing in the opinion or in the statement of the facts in the *French* (*Pere Marquette Ry.*) case that indicates that the decision of the Supreme Court would have been as it was, unless the order bill of lading was properly indorsed. Until that court otherwise decides, we shall hold that the rule laid down in the *French* (*Pere Marquette Ry.*) case, and with the exception in that opinion noted, is applicable only where the order bill of lading is properly indorsed * * *."

B. RESPONDENT'S DAMAGES WERE DUE TO DELIVERY WITHOUT A PROPER ENDORSEMENT ON THE BILL OF LADING.

Counsel suggest, page 23 of their brief, that the real cause of the loss was the forwarding of the bill of lading and the failure by respondent to repudiate the act of its agent.

Again we submit that this reasoning arises from a misinterpretation of the *Pere Marquette Ry. Co.* case. Counsel have failed to realize that in the *Pere Marquette Ry. Co.* case the bill of lading as surrendered contained a proper endorsement and consequently the purchaser to whom the carrier delivered the goods was a person who fulfilled the requirements of Sec. 9(c) (Title 49, U.S.C.A. Par. 89) of the Act. In the case at bar the bill of lading was forwarded without any endorsement upon it, so there was no person who fulfilled the requirements of sec. 9(c), and there was and could be no loss to the respondent from

any actions on the part of anyone, unless and until the carrier, in violation of its duty, delivered the goods without requiring surrender of a bill of lading, *properly endorsed.*

C. THE STATE SUPREME COURT WAS CORRECT IN HOLDING, UNDER THE UNDISPUTED EVIDENCE IN THIS CASE, THAT THE PETITIONER WAS NOT JUSTIFIED, UNDER SECTION 9 OF THE FEDERAL BILLS OF LADING ACT (TITLE 49, SECTION 89 U.S.C.A.), IN DELIVERING THE GOODS TO HICKMAN FARM SUPPLIES, INC.

1. *Section 9(c)* of the Act.

(a) As affected by the terms of the purchase order.

Counsel for petitioner, in this section of the brief, p. 24, rely upon section 9 of the Federal Bills of Lading Act and quote from a portion of subsection (c).[4]

They recite the purchase order specified terms "OPEN" and then categorically state,

> "This signified a delivery of the goods without prior payment (R. 45)."

As heretofore mentioned in our Statement of the Case, p. 4, we are unable to accept this conclusion as a proper statement of facts. Moreover, any difference in understanding between Hickman Farm Supplies, Inc. and respondent, if there was any, would not operate to relieve petitioner railroad company of any of its duties and obligations under the Federal Bills of Lading Act, or under the terms of the order bill of lading upon which the shipment was made.

---

[4]The full quotation is as follows:

> "a person in possession of an order bill for the goods, *by the terms of which the goods are deliverable to his order;* or which had been endorsed to him, or in blank by the consignee, * * *." (Emphasis indicates the excepted portions of petitioner's quotation).

As stated in

Atlantic Coast Line Ry. v. Dahlberg Brokerage Co., 154 So. 169; 170 Ala. 617

(a case decided prior to the Bills of Lading Act) in which the purchaser thought he was buying on credit, the court said:

> "The testimony then, as to the terms on which Deans bought the goods, amounted to nothing, and might well be ignored. Defendant's (carrier) right to delivery to him depended upon the conditions of the plaintiff's delivery to it."

The case of

Smith v. Landa, 45 Tex. Civ. App. 446; 101 S. W. 470

cited by petitioner, is clearly distinguishable from the case at bar and has no particular relevancy to the question at hand, as the opinion does not discuss rights between the shipper and a railway company, but as between the purchaser and the shipper over an alleged failure to follow instructions in selecting an "open" or a "closed" bill of lading. The Texas court clearly pointed out that a shipment made under a straight bill can be classed as an "open" transaction, while a shipment under an order bill of lading is generally considered as a "closed" shipment. In the case at bar the shipment was made upon an order bill of lading or "closed" transaction.

(b) Failure to notify Hickman Farm Supplies, Inc. that the original bill of lading had been erroneously forwarded to it.

Petitioner, p. 25 of its brief, recites that respondent had a duty to notify Hickman Farm Supplies, Inc. of the error in forwarding the original bill of lading and upon failing to so notify, ratified and confirmed the error and then concludes:

> "• • • as a result, Hickman Farm Supplies, Inc. had implied authority to endorse the bill of lading and take delivery of the goods."[5]

Petitioner's counsel quote, p. 25 of their brief, from *Restatement of Law, Agency.* We question the application of this quotation; we suggest that petitioner has again overlooked the fact that respondent's knowledge of the error included information to the effect, and the fact was, that the bill of lading was *not endorsed* when it was erroneously forwarded.[6]

The duty claimed to exist is phrased in language of agency law, but is actually a form of negligence law, and any liability found is grounded on the failure to use reasonable care.

The State Supreme Court stated upon the question presented, p. 529:

> "Whether plaintiff was negligent in not taking steps to prevent defendant being defrauded by a forgery of plaintiff's name as an indorsement on the bill of lading, could be considered as a question for the jury; and the jury seems (as we infer from statements in the opinion of the trial judge on denying the motion for judgment notwithstanding the verdict) to have passed on the question of plaintiff's negligence and decided it in favor of plaintiff. We cannot say that such decision finds no sufficient support in the testimony."

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[5]This is the first that petitioner has asserted such contention as no claim in this regard was made in the courts below. Further, there is no evidence in the record that the typewritten endorsement, "Adel Prec. Prod. Corp." was placed upon the order bill of lading by Hickman Farm Supplies, Inc. or any of its agents. In fact all of the witnesses employed by Hickman Farm Supplies, Inc. produced by petitioner denied that Hickman Farm Supplies, Inc. or its agents had placed this typewritten endorsement upon the order bill of lading (R. 52, 54, 59).

[6]Respondents credit manager clearly explained the reason that he did not notify Hickman Farm Supplies, Inc. or the carrier. The witness explained that the bill of lading having been sent first class mail, would travel much faster than the carload of freight, would reach Lansing and be returned because not endorsed, be received in California for proper endorsement and attachment of a sight draft, and sent back to a bank in Lansing long before the arrival of the carload of freight at Lansing (R. 33).

(c) No notice of infirmity of title in Hickman Farm Supplies, Inc.

Counsel for petitioner, in effect, claim that because petitioner railroad company had no knowledge that the purported typewritten endorsement had not been authorized, it was justified in making a delivery under the decision in the *Pere Marquette Ry.* case.[7]

While this position arises from a lack of appreciation of the holding in the *Pere Marquette Ry.* case, it also appears that this argument results from a misinterpretation of Section 10 (49 U. S. C. A. Par. 90) of the Act. Actually Section 10 is in fact and form, a *limitation* upon the rights of the carrier under Section 9(b) and (c) (49 U. S. C. A. Par. 89), but counsel for petitioner is contending that it is an *extension* of such rights.

The State Supreme Court in disposing of the contention here made by petitioner, stated (p. 525):

> "The *Pere Marquette Case, supra,* is to be differentiated from the instant case because of the dissimilarity of the facts in the *Pere Marquette Case* from the facts in the instant case. In the *Pere Marquette Case,* the bill of lading was properly indorsed, while in the instant case, the bill of lading under the finding by the jury, was not properly indorsed, and the ground on which the court in the *Pere Marquette Case* exonerated the common carrier, was different from the ground which the defendant in the instant case claims as a basis for exoneration."

2. *Section 9(a)* of the Act,

(a) as affected by Section 29 of the Act.

It appears to us that counsel for petitioner have *assumed* the major premise in their argument under this

---

[7]This, we feel, is the crux of petitioner's entire argument. This contention can lead to only one conclusion and that is that an order bill of lading, regardless of its terms, is a "bearer" instrument unless the carrier had knowledge or should have had knowledge that the endorsement was unauthorized, forged or for any other reason ineffective.

Such a position finds no support in the Federal Bills of Lading Act, and that Act did not change the law as announced in the *Keystone Grape Co.* case. An examination of Sec. 20(11) Part I of the Interstate Commerce Act (Title 49 U. S. C. A. §20(11), and Sec. 10 of the Bills of Lading Act (49 U.S.C.A. Par. 90) as complemented by Sec. 9(c), reveals the carryover of the common law liability as announced by the *Keystone Grape Co.* case.

section of their brief. Counsel categorically state, p. 28:

> "The bill of lading had been transferred to Hickman Farm Supplies, Inc. and it had acquired thereby title to the goods as against the respondent."

Presumably they contend that the erroneous physical transfer of the order bill of lading was, in language of Sec. 29 of the Act,

> "accompanied with an agreement, express or implied, to transfer the title to the bill or to the goods represented thereby."

It can only be presumed, because there is no other basis for such claim, that this is based upon counsel's contention as to Hickman Farm Supplies, Inc.'s interpretation of the term "OPEN" in the purchase order.

Whether this constituted an "agreement" was a question of *fact*, at most a disputed question of fact, and was decided contrary to petitioner's position by the jury, the trial court, and the State Supreme Court.

II.

THE STATE SUPREME COURT WAS CORRECT IN HOLDING, THAT IT WAS PROPER FOR THE TRIAL COURT TO SUBMIT TO THE JURY THE QUESTION OF RATIFICATION.

Ratification is essentially a fact question as to the intent of the party involved, and except in the unusual situation in which the facts are undisputed or of such a nature that only one reasonable conclusion can be reached thereon, the question is one for the jury. 13 C.J.S., *Carriers* §174c(3), p. 353. Being as it is a subsequent acting principle, ratification can only be applied from the facts which have occurred after the person who is to do the ratifying has had full knowledge of the facts. Petitioner's counsel in this case have argued that the court must take into account facts which occurred prior to the obtaining of full knowledge by the respondent, a proposition clearly

at odds with the very idea of ratification, but even if such a principle could be established, it would be of no avail in the present instance for there were no probative facts presented in this case, occurring prior to respondent obtaining full knowledge, which would show an intent on the part of the respondent to sell goods to Hickman Farm Supplies, Inc. on credit.

The only undisputed facts which could have a possible bearing on the question of ratification are the fact that the respondent did request payment for the value of the goods from Hickman Farm Supplies, Inc., and the fact that this demand for payment was made after an explanation of the respondent's position in regard to sales on open account in the letter of August 19, 1948, Exhibit 17 (R. 47, 48).

From the above analysis it can be seen that the essence of the argument of the petitioner is that a mere demand for payment constitutes a ratification as a matter of law, a proposition which appears to have been nowhere accepted by the courts with the possible exception of some dicta in the case of

Midland Linseed Co. v. American Liquid Fireproofing Co., supra

and there has been cited no other authority. The *Midland Linseed Case* involved a situation in which there had been a partial payment made on the price of the goods wrongfully delivered, so that consequently the broad statement quoted by the petitioner, on page 30 of their brief, was not necessary to the decision of the case, and must be considered as dictum.

There may be some difference of opinion between the courts of the states as to exactly where the dividing line may fall, and beyond which there will be ratification as a matter of law. A mere demand for payment, however, is not a ratification, as a matter of law. 15 A.L.R. 2d 813, §7.

Finally, it can be seen from the opinion of the State Supreme Court that there is no conflict between its holding in the instant case and the holding in the decision of the Iowa court in the *Midland Linseed Case* cited by petitioner, for the court points out at p. 527:

"The facts in the *Midland Linseed Co.* case (the Iowa case) are materially dissimilar to the facts in the instant case * * *."

APPENDIX B

Relevant provisions of the Federal Bills of Lading Act:

"Sec. 8. (49 U.S.C.A., §88.) That a carrier, in the absence of some lawful excuse, is bound to deliver goods upon a demand made either by the consignee named in the bill for the goods, or, if the bill is an order bill, by the holder thereof, if such a demand is accompanied by —

(a) An offer in good faith to satisfy the carrier's lawful lien upon the goods;

(b) Possession of the bill of lading and an offer in good faith to surrender, properly indorsed, the bill which was issued for the goods, if the bill is an order bill; and

(c) A readiness and willingness to sign, when the goods are delivered, an acknowledgment that they have been delivered, if such signature is requested by the carrier.

In case the carrier refuses or fails to deliver the goods, in compliance with a demand by the consignee or holder so accompanied, the burden shall be upon the carrier to establish the existence of a lawful excuse for such refusal or failure."

"Sec. 9. (49 U.S.C.A., §89.) That a carrier is justified, subject to the provisions of the three following sections, in delivering goods to one who is —

(a) A person lawfully entitled to the possession of the goods, or

(b) The consignee named in a straight bill for the goods, or

(c) A person in possession of an order bill for the goods, by the terms of which the goods are deliverable to his order; or which has been indorsed to him, or in blank by the consignee, or by the mediate or immediate indorsee of the consignee."

"Sec. 10. (49 U.S.C.A., §90.) That where a carrier delivers goods to one who is not lawfully entitled to the possession of them, the carrier shall be liable to anyone having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by subdivisions (b) and (c) of the preceding section; and, though he delivered the goods as authorized by either of said subdivisions, he shall be so liable if prior to such delivery he —

(a) Had been requested, by or on behalf of a person having a right of property or possession in the goods, not to make such delivery, or

(b) Had information at the time of the delivery that it was to a person not lawfully entitled to the possession of the goods.

Such request or information, to be effective within the meaning of this section, must be given to an officer or agent of the carrier, the actual or apparent scope of whose duties includes action upon such a request or information, and must be given in time to enable the officer or agent to whom it is given, acting with reasonable diligence, to stop delivery of the goods."

"Sec. 29. (49 U.S.C.A., §109.) That a bill may be transferred by the holder by delivery, accompanied with an agreement, express or implied, to transfer the title to the bill or to the goods represented thereby. A straight bill can not be negotiated free from existing equities, and the indorsement of such a bill gives the transferee no additional right."

"Sec. 32. (49 U.S.C.A., §112.) That a person to whom a bill has been transferred, but not negotiated, acquires thereby as against the transferor the title to the goods, subject to the terms of any agreement with the transferor. *If the bill is a straight bill* such person also acquires the right to notify the carrier of the transfer to him of such bill and thereby to become the direct obligee of whatever obligations the

carrier owed to the transferor of the bill immediately before the notification." • • • (Emphasis supplied.)

"Sec. 33. (49 U.S.C.A., §113.) That where an order bill is transferred for value by delivery and the indorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the bill, unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made. This obligation may be specifically enforced."

"Sec. 34. (49 U.S.C.A., §114.) That a person who negotiates or transfers for value a bill by indorsement or delivery, unless a contrary intention appears, warrants —

(a) That the bill is genuine;

(b) That he has a legal right to transfer it;

(c) That he has knowledge of no fact which would impair the validity or worth of the bill;

(d) That he has a right to transfer the title to the goods, and that the goods are merchantable or fit for a particular purpose whenever such warranties would have been implied if the contract of the parties had been to transfer without a bill the goods represented thereby."

Relevant provisions of Section 20(11), Part I, of the Interstate Commerce Act, (Title 49 U.S.C.A., Sec. 20(11)):

"That any common carrier, railroad, or transportation company subject to the provisions of this part receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and • • • any common carrier, railroad, or transportation company de-

livering said property so received and transported shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, * * * for the full actual loss, damage, or injury to such property caused by it * * *"

Relevant provisions of the Uniform Order Bill of Lading:

"The surrender of this Original Order Bill of Lading properly indorsed shall be required before the delivery of the property."

INDEX

	Page
Reply to:	
Argument	9-14
Counter-Statements of the Facts	1-8
Questions Presented	8
Conclusion	15

TABLE OF CASES AND TEXTBOOKS CITED

Annotation 60, A. L. R. 677	13
Davis v. Fruita Mercantile Co., 74 Col. 247, 220 P. 983	10, 12, 13
Keystone Grape Co. v. Hustis, 232 Mass. 162, 122 N. E. 269	6, 10
Pere Marquette R. Co. v. J. F. French & Co., 254 U. S. 538	10, 11, 12
Smith v. Landa, 45 Tex. Civ. App. 446, 101 S. W. 470	5

SECTIONS OF THE FEDERAL BILLS OF LADING ACT CITED

Sections 9(a) and (c), (Title 49 U. S. C. A. Sec. 89)	9, 14
Section 10, (Title 49 U. S. C. A. Sec. 90)	9, 14
Section 29, (Title 49 U. S. C. A. Sec. 109)	9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 208

GRAND TRUNK WESTERN RAILROAD COMPANY,
a Michigan corporation,
Petitioner,
vs.
ADEL PRECISION PRODUCTS CORPORATION,
a corporation,
Respondent

REPLY TO RESPONDENT'S BRIEF OPPOSING PETITION FOR CERTIORARI

Your petitioner, Grand Trunk Western Railroad Company replies to respondent's opposing brief, as follows:

COUNTER-STATEMENT OF THE FACTS

Your petitioner takes exception to respondent's "Counter-Statement of the Facts" in the following respects:

At page 3, respondent says:

> "Counsel have omitted to add that the order bill of lading so erroneously mailed was *not endorsed* and that the original bill of lading did *not* contain the typewritten endorsement
>
> 'Adel Prec. Prod. Corp.'
>
> at the time of such mailing (R. 22-23). And the State Supreme Court found, page 522:
>
> 'There is no testimony that the endorsement, "Adel Prec. Prod. Corp." in typewriting was on the original when received by Hickman.' "

While petitioner claimed, at the trial, that the jury might properly have drawn the inference that Mr. Noon, Newkirk Manufacturing Company's Acting Shipping Clerk, in preparing the bill of lading, placed the typewritten endorsement thereon, petitioner concedes that the State Supreme Court correctly held, on appeal to that court, that the typewritten endorsement was not on the original bill of lading when received by Hickman Farm Supplies, Inc., nor does petitioner now question that holding before this court.

Petitioner again points out that the State Supreme Court, at page 522 of its opinion, also found:

> "Alton Graeff, general manager of Hickman, testified that he signed 'Hickman Farm Supp. Inc.,' and his own name underneath that of his company under the typewritten 'Adel Prec. Prod. Corp.' indorsement, before Exhibit No. 7 was delivered to defendant."

To avoid any possible confusion that might arise from the reference by respondent, in the first sentence hereinabove quoted, to "the order bill of lading" and "the original bill of lading", it seems appropriate to explain

that there is only one bill of lading involved in this lawsuit, which is the original order bill of lading, Exhibit 7.

At pages 3-4, respondent says:

> "The following, with respect to the endorsement, is an additional pertinent quotation from the opinion of the State Supreme Court, p. 524:
>
> > 'There was no proper endorsement on the order bill of lading, according to undisputed testimony, because the typewritten endorsement is clearly shown to have been unauthorized.' "

Your petitioner claims that the State Supreme Court was in error in concluding that, according to undisputed testimony, the typewritten endorsement was unauthorized. While conceding that, under undisputed testimony, there was no *specific authorization* of the typewritten endorsement by respondent, nevertheless petitioner claims that the undisputed testimony does show an implied authorization by respondent, arising from its own conduct and failure to take appropriate action after learning of the error of its agent, Newkirk Manufacturing Company, in forwarding the bill of lading direct to Hickman Farm Supplies, Inc., or that, in any event, respondent is now estopped to deny such authorization.

At page 4, respondent refers to an interpretation by its Credit Manager, Willard Allen, of the term "OPEN", saying:

> • • • "Respondent's credit manager testified that in his opinion the term 'OPEN' would 'not necessarily' mean open account (R. 36), that he did not so interpret it, and that when he issued shipping instructions he specified 'sight draft order bill of lading' (R. 30)." • • •

Although respondent's Credit Manager, Willard Allen, did express an opinion, in his testimony at the trial, that the term "OPEN" does not necessarily mean "open account" (R. 36), it is important to take note that he did not see the purchase order (Exhibit 12), prior to the time this shipment was made, and therefore it would have been impossible for him to interpret "OPEN" in the purchase order in specifying "sight draft order bill of lading" in the instructions he furnished Newkirk Manufacturing Company. He testified:

> "I know of the company known as the Hickman Farm Supply Company located in Lansing. *I knew of a shipment to them in about July of 1948. The original order I did not see at the time. The sales department handled it. I later saw an order from them,* and I learned that it involved some equipment that was manufactured by the Newkirk Company and was going to be shipped by them. *The transaction* came to my attention in determining the terms of the shipment. I specified the terms of the shipment. I specified sight draft order bill of lading" (R. 29-30). (Emphasis supplied.)

He also testified:

> "A. • • • *Exhibit 12 did not come into my hands prior to the time this shipment was made.*
>
> Q. Now, after 'terms' when it says 'open' it means open account, doesn't it?
>
> A. Not necessarily.
>
> Q. *This particular purchaser could well have understood it as saying 'open account', couldn't he?*
>
> A. *He could have understood it to say 'open account.'* " (R. 36). (Emphasis supplied.)

It should be noted from the above, that the witness Allen conceded that the purchaser (Hickman Farm Supplies,

Inc.) could have interpreted "OPEN" as saying "open account". That was the exact interpretation actually given by the purchaser, Hickman Farm Supplies, Inc. (R. 45, 57). That interpretation of the term "Open" in a purchase order is supported by the case of *Smith v. Landa*, 45 Tex. Civ. App. 446, 101 S. W. 470. In that case, the purchaser sued Landa, the seller, for loss alleged to have been suffered by reason of the seller's failure to comply with a purchase order alleged to have specified "shipper's order notify". The seller claimed that the purchaser had ordered the shipment "open". The Court, referring to these terms, said:

> "A shipment direct to the consignee without restrictions is called an 'open' shipment, and justifies the carrier in delivering to the consignee upon identification."

Further, respondent's Credit Manager, after the shipment had been made, interpreted this transaction as having been handled on an open account basis. Reference is made to his testimony at the trial, where he read, in part, a letter written by him on August 19, 1948, in which it was stated:

> • • • "It is true that this particular order came to you on an open account basis, but it was done through an error of an inexperienced clerk at the plant of Newkirk Manufacturing Company at Anaheim" (R. 34-35).

Subsequently, on September 28, 1948, he wrote a letter (Exhibit 13), stating in part:

> "On August 19, 1948 we wrote to you about the balance of $13,101.09 open on your account with us, with particular reference to the carload shipment which was made to you on July 30th on an open account basis" (R. 55).

In the footnote, at page 4, respondent asserts:

> "Interpretation of the phraseology of the purchase order by others is, therefore, immaterial. The rights between petitioner and respondent are fixed by the contract between them, i.e., the order bill of lading."

In the footnote at page 6, respondent quotes the surrender clause of the bill of lading, as follows:

> "The surrender of this Original ORDER Bill of Lading properly indorsed shall be required before the delivery of the property."

We understand from the foregoing that it is the position of the respondent that a delivery by a carrier without compliance with the surrender clause of the bill of lading renders the carrrier liable for conversion without anything more. That is also the position taken by the State Supreme Court, at page 529 of its opinion (332 Mich. 519), in quoting from the syllabus in the case of *Keystone Grape Co. v. Hustis,* 232 Mass. 162 (122 N. E. 269). Petitioner claims that this was error.

At page 4 of respondent's brief appears the following:

> " 'On August 19 respondent replied demanding payment for goods delivered (R. 34-35). This letter, while not in evidence, is mentioned in a later letter, dated September 28, 1948, (Exhibit 13) • • • .'
>
> "*Actually the letter of reply of August 19, 1948 above referred to, does appear in evidence as Exhibit 17* (R. 47, 48, 49, 50), does not demand payment and states in part" • • • (followed by a quotation from Exhibit 17.) (Emphasis supplied.)

A careful examination of the record would have disclosed that respondent wrote two letters on August 19, 1948. Exhibit 17 was signed by respondent's General Sales Manager (R. 47-50). This was Mr. Gardner (R. 32-33). The other letter of August 19, 1948, was written by Willard Allen, then respondent's Credit Manager (R .29). He testified with respect to this letter, as follows:

> "Now, after I learned that the original bill of lading had gone forward to the Hickman Supplies, I did write a letter to them saying that it had been sent in error or through a mistake. I don't recall the exact date. It was after I had received a copy of the letter from them to Mr. Gardner, at which time I learned they had accepted delivery. (Witness leaving stand and returning with file.) On August 19, 1948. I have a copy of the letter here.
>
> Q. (Counsel examining letter.) Can you point out where it says that it was sent in mistake? I can't read that.
>
> A. It says: 'As Mr. Gardner is explaining to you, this is not altogether true. It is true that this particular order came to you on an open account basis, but it was done through an error of an inexperienced clerk at the plant of Newkirk Manufacturing Company at Anaheim.'
>
> Q. Well, that wasn't notifying them that it was sent through error and asking them to take care of the situation or anything like that, was it?
>
> A. I believe I asked them to pay for the shipment at the time.
>
> Q. Well, don't you always ask for the payment of open accounts if they are not paid within—
>
> A. (Interposing): Not always" (R. 34-35).

The letter (Exhibit 13), dated September 28, 1948, also written by Mr. Allen, states:

> "On August 19, 1948, we wrote to you about the balance of $13,101.09 open on your account with us, with particular reference to the carload shipment which was made to you on July 30th on an open account basis" (R. 55).

Thus, in the above quoted testimony, respondent's Credit Manager acknowledged having made a demand for payment at the time (viz., August 19, 1948), and substantially admits such a demand in his said letter of September 28, 1948.

QUESTIONS PRESENTED

At page 5, respondent suggests a rephrasing of the first of the "Questions Presented", set forth at page 4 of the Petition for Writ of Certiorari. Petitioner does not concur in respondent's suggestion as to how that question should be rephrased. It begs the question and does not present the issues that the petitioner seeks to have this Court review.

ARGUMENT

A.

Reference is made to petitioner's original brief, pages 24-28, for a statement of petitioner's position with respect to the application of Sections 9(a) and 9(c) of the Federal Bills of Lading Act, and to pages 28-30 for a statement of its position on the question of ratification.

With respect to Sections 9(a) and (c), briefly summarized, petitioner claims that, under the undisputed evidence, respondent must be deemed to have accepted, (or is estopped to deny acceptance), the order for the goods of Hickman Farm Supplies, Inc. upon the terms specified in the purchase order (Exhibit 12), viz., "OPEN". Further, the forwarding of the bill of lading directly to Hickman Farm Supplies, Inc. by Newkirk Manufacturing Company, respondent's agent for making the shipment, was acquiesced in and ratified by respondent (or respondent is estopped to deny ratification), resulting in a transfer of the bill of lading under Section 29 of the Federal Bills of Lading Act. In that connection, respondent failed to notify Hickman Farm Supplies, Inc. that its order "OPEN" was not accepted, nor did respondent notify Hickman Farm Supplies Inc., of an error of its said agent in forwarding the bill of lading directly to Hickman Farm Supplies, Inc., until after delivery of the goods, although it had knowledge of that error for upwards of twelve days prior to the time of delivery. Further, petitioner claims that respondent could have suffered no damages by reason of the alleged misdelivery by your petitioner of the goods, and, therefore, petitioner is not liable to respondent under Section 10 of the Federal Bills of Lading Act, and the decision of this

Court in *Pere Marquette R. Co. v. J. F. French & Co.*, 254 U. S. 538, 546-547). In the case at bar, respondent is the seller of the goods, under whose direction the shipment was made, and respondent is not in the position of a third party, to whom the bill of lading had been negotiated for value and without notice.

B.

At pages 10, and 12-14, respondent refers to the cases of *Keystone Grape Co. v. Hustis*, 232 Mass. 162, 122 N. E. 269, and *Davis v. Fruita Mercantile Co.*, 74 Col. 247, 220 P. 983.

In the footnote at page 12, respondent quotes the surrender clause so-called, of the bill of lading, and says:

> "Although petitioner recites in its brief that the bill of lading (Exhibit 7) bore the statement,
>
> > 'The surrender of this Original ORDER Bill of Lading properly endorsed shall be required before the delivery of the property,'
>
> counsel makes no reference or comment upon its significance throughout their entire brief. Counsel for petitioner completely ignore this provision in their Argument and the contention that they urge contradicts this language."

In also quoting the same provision of the bill of lading, in the footnote at page 6 of the opposition brief, counsel makes the following comment:

> "Petitioner has substantially ignored this provision and suggests no method of avoiding these contractual obligations, a provision which is not prohibited by law or contrary to express legislative intent."

It is apparent that respondent relies upon the proof that it did not actually place the typewritten endorsement of its name on the bill of lading or specifically authorize it, and claims this, of itself without anything more, renders petitioner liable in conversion. That claim is contrary to the decision of this Court in *Pere Marquette R. Co. v. J. F. French & Co.*, 254 U. S. 538, 546-547, cited at pages 21-22 of petitioner's original brief. At page 546 of the opinion in that case, the question is there posed:

> "Does a delivery without compliance with the surrender clause of the bill of lading render the carrier liable for conversion under the facts shown here?"

This question is answered, at page 547. It is there said:

> "But where delivery is made to a person who has the bill or who has authority from the holder of it, *and the cause of shipper's loss is not the failure to require surrender of the bill, but the improper acquisition of it by the deliveree or his improper subsequent conduct,* the mere technical failure to require presentation and surrender of the bill will not make the delivery a conversion. • • •
>
> "Similarly, in the case before us, the failure of the carrier to require production and surrender of the bill of lading did not cause the loss. *The same loss would have resulted if the bill had been presented and surrendered. The real cause of the loss was the wrongful surrender of the bill* of lading by the Indianapolis bank to Marshall & Kelsey" • • •. (Emphasis supplied.)

and at page 548, it is said:

> "The delivery was made to one in possession of the bill of lading who could, and doubtless would, have surrendered it, had he not been prevented by

> distance from doing so. *To hold a carrier liable under such circumstances would seriously interfere with the convenience and the practice of business.*" (Emphasis supplied.)

Obviously this Court, in its above decision in *Pere Marquette R. Co. v. J. F. French & Co., supra,* was greatly concerned with the effect that a contrary decision would have upon the *convenience and practice of business.* The Michigan Supreme Court did not give the same consideration to the facts in the case at bar, and if its decision be allowed to stand, it would mean that hereafter carriers could not safely rely upon endorsements on order bills of lading, valid upon their face, in delivering goods upon surrender of such order bills of lading. Carriers would then be forced to require specimen signatures of all persons, authorized to sign bills of lading, or in lieu thereof, require indemnity bonds or similar undertakings to protect themselves from liability for conversion. Such a burden would be intolerable, not only to the carriers but to the shippers, and would be a serious detriment to the normal flow of business.

In support of its position that petitioner is liable in conversion because, under its claim, the bill of lading was not properly endorsed, respondent quotes, at pages 13-14, from the case of *Davis v. Fruita Mercantile Co., supra,* in part, as follows:

> "The converse is necessarily true, that the carrier is not justified if the bill is not properly indorsed, * * *. The court several times repeats, as if by way of emphasis, that the order bill of lading in that case was indorsed in blank by the consignee, which, of course, brings the case clearly within the purview of subdivision 'c', section 9. There is

> nothing in the opinion or in the statement of the facts in the *French (Pere Marquette Ry.)* case that indicates that the decision of the Supreme Court would have been as it was, unless the order bill of lading was properly indorsed. Until that court otherwise decides, we shall hold that the rule laid down in the *French (Pere Marquette Ry.)* case, and with the exception in that opinion noted, is applicable only where the order bill of lading is properly indorsed * * *."

The statement of law, above quoted, is in broad general terms, and should be restricted in its application to the facts in that case. It should be noted that the facts in *Davis v. Fruita Mercantile Co., supra,* are distinguishable from the facts of the case at bar, in that the shipper in that case, not as in the case at bar, sent the bill of lading with draft attached for collection through a bank, thereby evidencing an intention to reserve title until the draft was paid, *Annotation 60, A. L.* R. 677; and also the bill of lading in that case, not only was not surrendered to the carrier bearing shipper's purported endorsement, as was done in the case at bar, but was returned to the collecting bank, which further evidenced an intention that there should be no change in title.

We claim that a careful perusal of *Davis v. Fruita Mercantile Co., supra,* shows that the Court in that case recognized the ultimate question determining carrier's liability was whether the party, to whom the goods were delivered, was entitled to possession of the goods. At page 250 (Colorado Reports), the Court says:

> "Still further condensed, and otherwise phrased, the question is, was the Harris Brothers Grain Company, having physical possession of an unendorsed bill of lading, under the facts stipulated, lawfully entitled to the possession of the hay?"